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No. 87-1021

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PLAYTEX HOLDINGS, INC.,
Petitioner,
v.
KELLY M. O'GILVIE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

None of the arguments presented by respondents warrants denial of the Petition.

Jurisdiction

First, respondents believe that Playtex has miscaptioned its Petition and that the miscaptioning is somehow "jurisdictional." Respondents are mistaken. On December 23, 1986, while the present case was under submission in the court of appeals, International Playtex, Inc. and its related corporations reorganized. International Playtex Inc. was dissolved; and its assets and liabilities were dispersed among various components of Playtex Holdings, Inc. Neither party moved the lower court for a substitution of parties. Instead, the action proceeded to judgment in the name of International Playtex, Inc., apparently pursuant to 8 Del. Code Ann. § 261 (1983),[1] which provides:

[1] International Playtex, Inc. was organized under the law of Delaware, as is Playtex Holdings, Inc. Petitioner's Rule 28.1 statement appears in the Petition at ii.

> Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

See also *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949) ("a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing").[2]

While preparing Playtex's Petition for Writ of Certiorari, counsel inquired of this Court's Clerk's Office whether to continue the practice below, and list International Playtex, Inc. as petitioner, or to caption the petition with Playtex Holdings, Inc. The Clerk's Office advised that the petitioner be listed as Playtex Holdings, Inc. and that the corporate change be mentioned in the "Parties to the Proceeding" section of the Petition. Playtex followed that advice. Petition for Writ of Certiorari at ii, 3.

That advice was correct. On the facts, Playtex Holdings, Inc. is not a "stranger" to this litigation, and therefore is a proper party to proceed in this Court. Moreover, the advice of the Clerk's Office best effectuates this

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[2] Respondents assert that *United States* v. *Seigel*, 168 F.2d 143 (D.C. Cir. 1948), is "virtually identical to the appellate posture of this case." Brief in Opp. at 9. It is not, for at least three reasons. First, that case did not involve corporate succession. Second, the appellant there was neither a party in the lower court, nor the successor of a party. Finally, that case concerned an appeal from a district court, and was decided under former Fed. R. Civ. P. 25(d) and former 28 U.S.C. § 780, both of which have since been repealed. The new provisions are substantively quite different. *See generally, C. Wright & A. Miller*, 7C Federal Practice and Procedure §§ 1951-1958 (1986).

Court's Rule 28.1 and most easily apprises the Court of the present corporate interests whose stock is publicly traded.

Nevertheless, if the Court deems it necessary, it should consider the explanation in the Petition, which was filed within the jurisdictional time limit, a motion for substitution of parties. Contrary to respondents' assertion, this Court has on several occasions granted motions to substitute one corporate party for another, even at the petition stage. *See Defense Supplies Corp.* v. *United States*, 326 U.S. 746 (1945); *see also Illinois* v. *Indiana*, 332 U.S. 822 (1947); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 207 n.3 (1946).[3] Thus, Respondents' point is not "jurisdictional." It is, at most, a housekeeping detail that may be resolved in a single sentence in an order granting certiorari.

The First Question Presented

1. Next, Respondents announce that "[n]one of the issues in this Petition were [sic] raised before the trial court." Br. in Opp. 3 n.2. Respondents are simply mistaken. As they themselves recognize, Br. in Opp. at 15, the propriety of a district court's independently reducing a jury's punitive damage award was raised and decided *sua sponte* by the district court. As set forth in the Petition, that issue was fully litigated on appeal and decided by the court below. See Petition at 5-6; Pet. App. at 16a-23a.

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[3] Alternatively, should the Court deem the present caption to have been ill-advised, the action may be maintained in the name of International Playtex, Inc., pursuant to the above-cited Delaware statute. *See Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949); *see also Oklahoma Gas Co.* v. *Oklahoma*, 273 U.S. 257 (1927); *cf. Gorham Manufacturing Co.* v. *Wendell*, 261 U.S. 1 (1923); C. Wright & A. Miller, 7C *Federal Practice and Procedure* § 1958 (1986). In that case, the present circumstance may be considered a mere error in captioning, which is not jurisdictional. *Cf.* S. Ct. R. 19.

2. Respondents argue that this case does not present the question whether "due process *requires* judges, not juries, to determine the amount of punitive damages." Br. in Opp. at 12 (emphasis added).[4] Playtex agrees. The question presented is not whether the Due Process Clause—or any other constitutional provision—*requires* that a court, rather than a jury, determine the amount of a punitive award. Rather, the question is whether the Seventh Amendment *permits* a court to determine the award. Respondents, and the Tenth Circuit, think not. However, in *Tull* v. *United States*, 107 S.Ct. 1831, 1840 n.9 (1987), this Court suggested otherwise: "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial." As demonstrated in the Petition, this quesion is of growing importance, and has been left open by the Court's prior cases. See Petition at 13.[5]

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[4] Respondents also suppose that a ruling for petitioner in this case would require that state judges, rather than juries, set the amount of punitive awards. Br. in Opp. at 16-19. A ruling for petitioner would have no such effect. First, Playtex does not invoke any authority binding on state courts and does not seek, in this action litigated in the federal courts, any ruling applicable to state courts. Second, a ruling for Playtex would not require even federal courts to set the amount of punitive awards, but would merely permit them to do so.

[5] *Day* v. *Woodworth*, 54 U.S. 363 (1851), is not to the contrary. The holding of that case is that, in an action for trespass, a jury may not award attorneys' fees as an element of damages. Thus, in the dictum cited by Respondents, the Court simply contrasted so-called "smart money," which a jury may award, with attorney's fees, which it may not. *See* 54 U.S. at 371. The Court did not hold that a jury *must* determine the amount of a punitive award, even in the first instance. And it certainly did not hold that a punitive award so determined may not be redetermined by the Court. *Day* antedates *Kennon* v. *Gilmer*, 131 U.S. 22 (1889) (Seventh Amendment precludes court from unilaterally reducing jury's compensatory award), and it obviously antedates *Tull*. *Day* therefore does not require a result contrary to that urged by Playtex.

3. Respondents also contend (Br. in Opp. at 15), as did the court of appeals (Pet. App. at 23a), that the trial court's reduction of the punitive award in this case would encourage defendants to persist in wrongful conduct in the hope that they could later barter their repentance for a reduction in punitive damages. Thus, respondents reason, a manufacturer defending a products liability action would keep its product on the market throughout the lengthy period required for litigation (and thereby expose itself to many more claims for compensatory and punitive damages), in the hope of reducing one future punitive award by withdrawing its product. The manufacturer, of course, would have no certainty that the belated withdrawal of its product would be given any weight at all by the trial court. Moreover, if it viewed its risk of a punitive award as substantial, it is highly unlikely that it would risk further punitive awards by keeping its product on the market in order to have a bargaining chip. Respondents' argument is, to say the least, counter-intuitive. It is like saying that criminal defendants currently have an incentive to continue their criminal conduct while awaiting trial, in the hope of obtaining reduced sentences due to post-conviction reform.

The Second Question Presented

Respondents apparently concede that Playtex's Due Process question was raised in the court of appeals. Br. in Opp. at 12. It was also raised in the district court, where Playtex argued that "[t]he award of punitive damages . . . denie[d] defendant the right to due process." Motion for Judgment Notwithstanding the Verdict and New Trial at 4. *See also* the Memorandum in Support thereof at 10 ("Defendant has been treated like a criminal, but has not had the Constitutional protections provided in a criminal case"). As noted in the Petition, this argument itself is sufficient reason to hold this case pending the outcome of *Banker's Life & Casualty Co. v. Crenshaw*, No. 85-1765 (argued November 30, 1987). In

fact, the present case provides a ready-made Fifth Amendment analogue to the Fourteenth Amendment question presented there.[6] On the other hand, should the Court in *Banker's Life* decide that the Eighth Amendment and Due Process Clauses are inapplicable or ineffective means for controlling punitive damages, the first question presented in this case would provide an opportunity to consider an alternative approach.

The Third Question Presented

1. Finally, respondents urge the Court not to decide whether FDA's labeling requirements preempt state tort law suits alleging inadequate warning. Respondents do not state—nor could deny—that the factual record is incomplete. As noted in the Petition at 15-17, the trial court specifically found and instructed the jury that the FDA had promulgated by regulation specific requirements for warnings on tampon packages, and that the Playtex warnings in issue had fully complied with those requirements. *See* Pet. App. at 48a, 53a. Moreover, the verdict form permitted the jury to find for plaintiffs only by answering "no" to the following question: "Did the label and instructions inside and outside the Playtex box at the time the product was being used by Betty O'Gilvie adequately and fairly inform and warn Betty O'Gilvie of the risk of TSS which may be fatal from using Playtex tampons?" Pet. App. at 50a.[7]

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[6] Although Playtex did not specifically cite the Eighth Amendment below, it did argue in the district court that the verdict's "extreme punitive impact . . . raises serious constitutional problems." Memorandum in Support of Motion for Judgment Notwithstanding the Verdict or New Trial, at 10. And in the court of appeals, Playtex did argue that the punitive award in this case was unconstitutional, and did cite for that proposition authority making the Eighth Amendment argument. *See* Brief of Defendant-Appellee, Cross-Appellant at 42-43.

[7] As respondents note, Brief in Opp. at 2, they did argue a variety of points to the jury. Nevertheless, the verdict form conditioned

2. Respondents miscite an FDA letter for the proposition that 21 U.S.C. § 360k and its implementing regulation, 21 C.F.R. § 808.1(b) (1987), do not preempt state tort law actions premised upon a theory of inadequate warning. That letter makes no such point. Instead, by its plain language, it deals only with the availability under state law of general remedies, such as an injunction, in suits that are otherwise proper. The letter merely takes the position that such generally available remedies are not preempted. The letter does not address whether substantive labeling requirements imposed under state common law are preempted.[8]

3. Since the present Petition was filed, at least three more courts have held state tort law actions preempted under § 360k or analogous statutes. *Lavetter* v. *International Playtex, Inc.*, No. 84-788-TUC-RMB (D. Ariz. Jan. 25, 1988); *Moore* v. *Kimberly-Clark Corp.*, No. 86-0560 (W.D. La. Dec. 23, 1987); *Wickstrom* v. *Maplewood Toyota*, No. Cl-87-1231 (Minn. App. Dec. 22, 1987); *see also Shick* v. *Chrysler Corp.*, Civ. No. 86-1061 (D. S.D. Dec. 15, 1987); *Gunsalus* v. *Celotex Corp.*, No. 85-7180 (E.D. Pa. Nov. 23, 1987). The present case presents the Court with a good opportunity to consider the validity of that growing body of law.

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any finding of liability upon a finding of inadequate warning. No other basis for the verdict, therefore, can properly be asserted in this Court. Respondents' contention that "this case was not solely a warning case," Brief in Opp. at 2, is simply contrary to the verdict form.

[8] The letter is further inapposite since, by its terms, it refers only to devices produced and placed in use prior to the enactment of the Medical Device Amendments of 1976, Pub. L. 94-295, 90 Stat. 539 (1976), 21 U.S.C. §§ 360c-360k (1982), which control here. Finally, unlike the requirements imposed here under Kansas law, the FDA letter addresses state requirements that have no federal counterpart.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Playtex's Petition for Writ of Certiorari, the writ should be granted.

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